

Scott Strachan, d/b/a S.M.S. Electrical and International Brotherhood of Electrical Workers Local Union No. 43 Pension, Health and Welfare, Annuity and Joint Apprentice Training Committee Trust Funds. Case 3-CA-18208

October 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

Upon a charge filed by International Brotherhood of Electrical Workers Local Union No. 43 Pension, Health and Welfare, Annuity and Joint Apprentice Training Committee Trust Funds on November 4, 1993, the Regional Director for Region 3 of the National Labor Relations Board issued a complaint on February 28, 1994, against Scott Strachan, d/b/a S.M.S. Electrical, the Respondent, alleging that it had failed to adhere to the terms of the most recent prehire agreement with the Union since May 4, 1993, in violation of Section 8(f)(M) of the National Labor Relations Act. On March 16, 1994, the Respondent filed an answer to the complaint denying the allegations therein.

Thereafter on November 9, 1994, the Regional Director approved an informal settlement agreement entered into by the Respondent and the Charging Party Funds in disposition of the complaint. On May 23, 1995, however, the Regional Director issued a second complaint that vacated the informal settlement agreement and realleged the same allegations contained in the original complaint, on the ground that the Respondent had failed to comply with the settlement agreement.

Although properly served copies of the second complaint, the Respondent failed to file an answer thereto.¹ Accordingly, on September 22, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On September 25, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the

complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the second complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the second complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated August 11, 1995, notified the Respondent that unless an answer were received by close of business August 18, 1995, a Motion for Summary Judgment would be filed. Nevertheless, as indicated above, the Respondent failed to file an answer to the second complaint.²

Accordingly, in the absence of good cause being shown for the failure to file a timely answer to the second complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent has been owned by Scott Strachan, a sole proprietorship, doing business as S.M.S. Electrical. At all material times, the Respondent has maintained an office and place of business at Sunnysbrook Drive, North Syracuse, New York, and has been engaged in commercial and industrial planning, layout, installation, and repair of wiring and electrical fixtures.

At all material times The Finger Lakes New York Chapter, N.E.C.A., Inc. (the Association) has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent those employers that have signed a "letter of assent A," in negotiating and administering collective-bargaining agreements with various labor organizations.

On about July 20, 1987, the Respondent signed a "letter of assent A," delegating its collective-bargaining authority to the Association and agreeing to be bound by the Association agreements.

During the calendar year ending December 31, 1993, the Respondent and the employers who signed "letters of assent A" with the aforementioned Association, in

¹ The second complaint was sent to the Respondent by certified mail, but was returned to the Regional Office marked "unclaimed." The Respondent's failure or refusal to claim certified mail, however, cannot defeat the purposes of the Act. *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

² Although the Respondent did file an answer to the original complaint, that answer was withdrawn by the explicit terms of the settlement agreement. The settlement form used by the parties was NLRB Form 4775, the standard informal settlement agreement, which expressly provides that approval of the settlement agreement "shall constitute withdrawal of any Complaint heretofore issued in this case, as well as any answer to the Complaint." original complaint does not remain extant and does not preclude summary judgment. See *Signage Systems*, 312 NLRB 1115 (1987); *Ofalco Properties*, 281 NLRB 84 (1986).

the course of their business operations, collectively purchased and received at their facilities located within the State of New York, products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of New York.

By virtue of the facts described above, the Respondent's execution of "letter of assent A" is sufficient to warrant the assertion of jurisdiction. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(fimDBUfi*ERR17*fimDNMfi13)fimDBUfi*ERR17*fimDNMfi14, Act and that International Brotherhood of Electrical Workers, Local Union No. 43, the Union, is a labor organization within the meaning of Section 2(fimDBUfi*ERR17*fimDNMfi15)fimDBUfi*ERR17*fimDNMfi16, Act.

II. ALLEGED UNFAIR LABOR PRACTICES

All electrical workers employed by the Respondent (fimDBUfi*ERR17*fimDNMfi17)fimDBUfi*ERR17*fimDNMfi18 the unit)fimDBUfi*ERR17*fimDNMfi19 of collective bargaining within the meaning of Section 9(fimDBUfi*ERR17*fimDNMfi20)fimDBUfi*ERR17*fimDNMfi21

About July 20, 1987, the Respondent entered into a "letter of assent A," whereby it authorized the Association to act as its collective-bargaining representative for all matters contained in or pertaining to the current approved inside collective-bargaining agreement between the Union and the Association, and agreed to be bound to such future agreements unless timely notice was given.

The Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(fimDBUfi*ERR17*fimDNMfi22)fimDBUfi*ERR17*fimDNMfi23, recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective for the period June 1, 1993, to May 31, 1996.

For the period from June 1, 1993, to May 31, 1996, and since the "letter of assent A" was signed by the Respondent, based on Section 9(fimDBUfi*ERR17*fimDNMfi24)fimDBUfi*ERR17*fimDNMfi25, the Union has been the limited exclusive collective-bargaining representative of the unit.

Since about May 4, 1993, the Respondent has failed and refused to adhere to the terms and conditions of the most recent prehire collective-bargaining agreement and has thereby repudiated that agreement.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(fimDBUfi*ERR17*fimDNMfi26)fimDBUfi*ERR17*fimDNMfi27, tion 2(fimDBUfi*ERR17*fimDNMfi28)fimDBUfi*ERR17*fimDNMfi29

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we will order the Respondent to comply with the terms of the most recent prehire collective-bargaining agreement, and to make the unit employees whole for any loss of earnings they may have suffered as a result of the Respondent's failure to do so since May 4, 1993. Backpay will be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (fimDBUfi*ERR17*fimDNMfi30)fimDBUfi*ERR17*fimDNMfi31, enf

est thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (fimDBUfi*ERR17*fimDNMfi32)fimDBUfi*ERR17*fimDNMfi33. In a make the unit employees whole for any loss of benefits from its failure to appropriate for the purposes of the most recent prehire agreement since May 4, 1993, by making any and all such delinquent benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (fimDBUfi*ERR17*fimDNMfi34)fimDBUfi*ERR17*fimDNMfi35, ing the unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (fimDBUfi*ERR17*fimDNMfi36)fimDBUfi*ERR17*fimDNMfi37, e

amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.³

Finally, pursuant to *J. E. Brown Electric*, 315 NLRB 620 (fimDBUfi*ERR17*fimDNMfi38)fimDBUfi*ERR17*fimDNMfi39, a reinstatement and backpay remedy for those applicants who would have been referred to the Respondent were it not for the Respondent's failure to abide by the agreement. Although the complaint does not specifically allege that the Respondent violated the hiring hall provisions of the prehire agreement, it does allege that the Respondent has failed to adhere to and has repudiated the prehire agreement. Further, we note that the prior informal settlement agreement executed by the parties, which as indicated above was set aside because of the Respondent's noncompliance, included a provision in the stipulated notice that specifically provided a make whole remedy for any employees who would have been referred from the Union's hiring hall as a result of the Respondent's failure to adhere to the agreement. In these circumstances, where the complaint alleges that the Respondent repudiated the prehire agreement, it is apparent from the record that

³ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a "set-off" to the amount that the Respondent

(fimDBUfi*ERR17*fimDNMfi40)fimDBUfi*ERR17*fimDNMfi41 and (fimDBUfi*ERR17*fimDNMfi42)fimDBUfi*ERR17*fimDNMfi43

the prehire agreement included hiring hall provisions, and the Respondent has failed to file an answer to the complaint, we find that it is appropriate to order a *J. E. Brown* reinstatement and backpay remedy. As indicated in *J. E. Brown*, the Respondent will have the opportunity to introduce evidence on reinstatement and backpay issues at the compliance stage.

Accordingly, pursuant to *J. E. Brown*, we will order the Respondent to offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and to make them whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's failure to hire them. Backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (fiMDBUfi*ERR17*fiMDNMfi1950) with interest as prescribed in *New Horizons for the Retarded*, supra.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Scott Strachan, North d/b/a S.M.S. Electrical, Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(fiMDBUfi*ERR17*fiMDNMfi1a)fiMDBUfi*ERR17*fiMDNMfi failing and refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union No. 43 as the limited exclusive bargaining representative of the Respondent's electrical workers by failing to adhere to and/or repudiating the most recent prehire collective-bargaining agreement.

(fiMDBUfi*ERR17*fiMDNMfi1b)fiMDBUfi*ERR17*fiMDNMfi In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(fiMDBUfi*ERR17*fiMDNMfi1a)fiMDBUfi*ERR17*fiMDNMfi Comply with the terms and conditions of the most recent prehire collective-bargaining agreement.

(fiMDBUfi*ERR17*fiMDNMfi1b)fiMDBUfi*ERR17*fiMDNMfi Make whole the unit employees for any loss of earnings, benefits, or expenses resulting from the Respondent's failure to comply with the agreement since May 4, 1993, with interest, as set forth in the remedy section of this decision.

(fiMDBUfi*ERR17*fiMDNMfi1c)fiMDBUfi*ERR17*fiMDNMfi Offer immediate and full employment to those applicants who would have been referred to the Re-

spondent by the Union were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of the Respondent's failure to hire them, in the manner set forth in the remedy section of this decision.

(fiMDBUfi*ERR17*fiMDNMfi1d)fiMDBUfi*ERR17*fiMDNMfi Present to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(fiMDBUfi*ERR17*fiMDNMfi1e)fiMDBUfi*ERR17*fiMDNMfi Post a copy of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(fiMDBUfi*ERR17*fiMDNMfi1f)fiMDBUfi*ERR17*fiMDNMfi Notify the employees within 60 days from the date of this Order what steps the Respondent has taken to comply.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Make whole the unit employees for any loss of The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local Union No. 43 as the limited exclusive bargaining representative of our electrical workers by failing to adhere to and/or repudiating the most recent prehire collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with the terms and conditions of the most recent prehire collective-bargaining agreement.

WE WILL make whole our unit employees for any loss of earnings, benefits, or expenses resulting from

⁴ Member Cohen would not the order Respondent to offer employment and backpay to hiring hall applicants. There is no allegation that the contract contained a hiring hall agreement. My colleagues infer the existence of such an agreement. That inference, however, is based on a remedial notice in an informal settlement. I have grave doubts as to whether a notice in an informal settlement can provide the basis for a finding of fact. More importantly, even if it could, the salient point is that the settlement has been set aside. In sum, there is no basis for finding a hiring hall agreement. Hence, it cannot be said that the Respondent modified or terminated any such agreement. In my view, a remedy for a hypothetical violation is inappropriate, and is well beyond the "limited and close focus" that I envisaged in my concurrence in *J. E. Brown*, supra.

our failure to comply with the agreement since May 4, 1993, with interest.

WE WILL offer immediate and full employment to those applicants who would have been referred for employment by the Union were it not for our unlawful failure to comply with the agreement, and WE WILL

make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them, with interest.

SCOTT STRACHAN, D/B/A S.M.S ELEC-
TRICAL